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No. 91-1451

In The

Supreme Court of the United States

October Term, 1991

MESA PETROLEUM CO., et al.,

Petitioners,

v.

DAVID COLAN and UNOCAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Court

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Pursuant to this Court's Rule 15.1, respondents point out that petitioner's statement of the question presented is erroneous. Petitioner's statement asserts that Mesa's decision to exchange its stock was economically coerced, that the exchange occurred pursuant to a corporate recapitalization, and that there was no potential for speculative abuse of inside information. As the Court of Appeals held, "the evidence is undisputed that the Mesa Defendants made a voluntary business decision to persuade Unocal to permit them to participate in the corporation's self-tender offer" after "the Mesa Defendants shrewdly calculated their options." (Pet. at 34a.) Accordingly, the question actually presented is that framed by the Court of Appeals in issuing its ruling:

Is "an exchange of common stock for a negotiable debt security pursuant to a tender offer . . . a 'sale' within section 16(b)"? (Pet. at 7a.)

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JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

Unocal[1] files this brief in opposition to Mesa's[2] petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Nothing in the Court of Appeals' decision merits review on certiorari. The Ninth Circuit's opinion is a straightforward

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[1] In this brief we follow the practice of the parties and refer to both Unocal Corporation and David Colan, plaintiffs in the underlying action, as "Unocal." Pursuant to Rule 29.1 of this Court, Unocal informs the Court that it owns approximately 96% of Unocal Exploration Corporation which is publicly traded (symbol "UXC"); all other Unocal subsidiaries are wholly owned.

[2] Again pursuant to the custom and practice in this case, we refer to all petitioners – Mesa Petroleum Co., Mesa Southern Co., Mesa Asset Co., CY-41, Inc. and JACK-41, Inc. – as "Mesa."

application of the principles enunciated by this Court in *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973). Those principles have been consistently applied in a myriad of decisions throughout the federal judiciary, including a unanimous body of cases refusing to create a section 16(b) exemption for short-swing profits garnered by "defeated" tender offerors.

Mesa's pronouncements of "sharp conflicts" between the Court of Appeals' decision and the law of other circuits can only be attributed to the "overzealous advocacy" for which Mesa was chastised by the Ninth Circuit. (Pet. at 18a.) There is no conflict. There is no split among the circuits.

Several of the handful of cases cited in the petition predate *Kern*. By definition they can create no conflict regarding the application of *Kern*. Virtually all of the cases relied upon by Mesa pertain to corporate reorganizations and stock reclassifications that changed the form of the insider's equity investment. The insider technically became a "seller," without any volitional act on its part and without altering the fundamental nature of the investment.[3] That is not what happened here.

Mesa made a calculated and wholly voluntary business decision to exchange its equity investment for notes obtained from Unocal in a tender offer. The exchange was made pursuant to a separate agreement negotiated exclusively between Mesa and Unocal, which, according to Mesa's chairman, brought Mesa a great "victory" in the form of an $83 million after-tax profit.

STATEMENT OF THE CASE

Section 16(b) of the Securities Exchange Act of 1934 requires disgorgement of "short-swing" profits realized by an

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[3] By and large these situations are now dealt with by SEC rules pursuant to the authority specifically granted to the Commission to exempt categories of transactions "not comprehended within the purpose of" § 16(b). 15 U.S.C. § 78p(b). See, e.g., Rule 16b-9, 17 C.F.R. § 240.16b-9 (1991) ("Exemption from section 16(b) of transactions involving the conversion of equity securities").

officer, director or more-than 10% shareholder. 15 U.S.C. § 78p(b). Unocal seeks disgorgement because Mesa sold Unocal shares within six months of its purchase after becoming a statutory insider by virtue of crossing the 10% ownership line. This section 16(b) claim arises out of Mesa's 1985 attempt to take over Unocal or exact a substantial "greenmail" payment.[4] After having had some success with this strategy in the early 1980's, in 1984 Mesa targeted Unocal and by late February 1985, Mesa had accumulated just below 10% of the outstanding shares of Unocal.[5] Mesa's agent, Boyd Jefferies, disguised Mesa's purchase of an additional 6.7 million shares of Unocal to make it appear that Mesa purchased these shares in a single block trade that would avoid 16(b) liability. In actuality, Mesa crossed the 10% line earlier (and in a series of separate steps) when Jefferies was accumulating the stock on Mesa's behalf.

On April 8, 1985, Mesa made a tender offer to purchase a controlling interest in Unocal at $54 per share. On April 16, Unocal responded by offering to purchase Unocal stock in exchange for senior notes with a par value of $72 per share. Unocal's offer was made to all shareholders except Mesa.[6] The threat of takeover remained, however, so long as Mesa continued to own so much Unocal stock. As the Court of

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[4] It has been judicially determined that Mesa's "principal objective" in purchasing the Unocal stock "was greenmail." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 952, 956 n.13, 959 (Del. 1985). See also, *Unocal Corp. v. T. Boone Pickens, Jr.*, No. 85-2179, at 13 (C.D. Cal. April 26, 1985) (memorandum decision) ("the Court finds . . . that Mesa II from the outset intended to put Unocal 'in play' and thereby either obtain control or 'greenmail' the corporation . . . . ").

[5] Despite statements in Mesa's original SEC Schedule 13D that its purpose was for "investment" only, Mesa claimed that it had changed its mind on March 28, 1985, when Mesa first announced that it was considering a takeover of Unocal.

[6] Mesa challenged its exclusion and was rebuffed by a decision of the Delaware Supreme Court, which upheld Unocal's tender offer. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958-59 (Del. 1985).

Appeals pointed out, "The parties dealt at arms length in the negotiations that followed. Unocal was concerned that if the Mesa defendants were excluded, they might buy up the devalued shares at a bargain price and seize control of the corporation." (Pet. at 25a.) After a period of intense settlement negotiations, Unocal and Mesa agreed that Mesa could participate in the Unocal self-tender which allowed Mesa to exchange some of its Unocal stock for senior notes. As a result of Mesa's attempted takeover, Unocal incurred over $4 billion in debt and was substantially harmed.

On May 20, 1985, Mesa sold 7,846,705 shares of Unocal stock to Unocal for senior notes worth $75 per share. Mesa was thus able to sell in May for $75, nearly 8 million shares of stock purchased two months earlier for $48 a share or less. On July 3, 1985, Mesa liquidated the senior notes for some $589 million in cash on the day it received them. With these transactions Mesa closed its greenmail campaign *within six months* of its March 1985 purchases, and, according to Mesa, pocketed a handsome $83 million after-tax profit.

Mesa of course disputes many of the facts which bear upon its section 16(b) "purchase" and which remain for the jury.[7] The only facts that are essential to this appeal, however, are that Mesa exchanged its stock voluntarily for debt instruments (essentially cash)[8] obtained via a tender offer. Mesa negotiated its own terms of sale. Despite Mesa's frequent

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[7] In this procedural posture Unocal is, in any event, entitled to the benefit that all nonessential facts be construed in its favor. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

[8] Mesa conceded that its exchange of Unocal equity stock for debt securities pursuant to Unocal's self-tender offer was a "sale" if § 16(b) is given literal interpretation. (Pet. at 21a, n.6.) In any event, Mesa exchanged the debt instruments for cash within six months of Mesa's March "purchase" of the Unocal shares at issue.

hyperbole regarding this case being "strikingly parallel to" *Kern*, the plain truth is that unlike the defendant in *Kern*, whose shares were going to be automatically converted to shares of the new entity no matter what it did, Mesa had a variety of options, including simply holding its stock or making a larger tender offer. As noted by the Court of Appeals, citing to Mr. Pickens' own words:

> We had a choice: we could make a deal with Unocal, or after they concluded their tender offer, we could make a 100 percent all-cash offer for the company. We got a call from Drexel asking us not to fold. They had raised $3 billion and were ready to raise the additional funds for us to make a 100 percent offer. It was an unqualified endorsement of Mesa, and it naturally gave us a lift.
>
> It would be a great campaign, no doubt about it, but the risks were getting very high. . . .
>
> * * *
>
> It was time to make a deal.

(Pet. at 25a-26a, quoting *Boone*.)

Mesa argues that its participation in the exchange was not voluntary because Mesa was "economically coerced" since it acted to avoid an alleged "substantial loss." Section 16(b), however, contains no language limiting its application in situations in which the insider acts to avoid a loss.[9] As the

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[9] Although Mesa emphasizes the paper loss that it would have recorded had it been forced to liquidate its investment immediately after Unocal's self-tender without participating in that exchange (which no one was forcing Mesa to do), the fact is that had Mesa merely held on to its Unocal stock until December 1989, the $450 million paper loss that it complains of could have turned into a more than $500 million gain. This billion dollar swing amply demonstrates the unworkability of Mesa's economic rationality test. Federal courts are ill-equipped to take on the additional role of investment banker, especially where to do so would eviscerate what Congress intended to be a simple, bright line test for § 16(b) liability.

Court of Appeals noted in response to Mesa's economic coercion argument: "An economic coercion test would allow corporate insiders to avoid section 16(b) liability by presenting evidence of a variety of unfortunate circumstances that forced them to sell their common stock. The objective standards of section 16(b) were adopted to avoid the necessity for an inquiry into an insider's subjective 'intent'. *Reliance Elec. Co.*, 404 U.S. at 422 (quoting *Bershad*, 428 F.2d at 696)." (Pet. at 29a.)

Mesa filed two summary judgment motions which were initially rejected by the trial court. The first pertained to whether Mesa had crossed the ten percent threshold in a single purchase exempting it from disgorgement under *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232 (1976), or in a series of steps with Jefferies acting as Mesa's agent. This fact issue remains to be decided by the jury.

On the eve of trial, and in response to the briefing on motions *in limine*, Mesa asked the district court to reconsider its second summary judgment motion, which pertained to the so-called "unorthodox transaction" exception to section 16(b). The parties agreed that the *in limine* motions could be treated as cross motions for summary judgment. On January 19, 1990, the district court granted Mesa's motion in a written opinion that was later amended. Neither opinion is reported. (The amended opinion of April 10, 1990 is found in the Petition at 36a-62a.)

On appeal the Ninth Circuit reversed the granting of summary judgment for Mesa and directed the district court to grant Unocal's motion for partial summary judgment on the inapplicability of the unorthodox transaction exception to this case. That opinion (as amended) is reported at 951 F.2d 1512 (9th Cir. 1991). On December 23, 1991, Mesa's petition for rehearing and rehearing *en banc* was denied.

REASONS FOR DENYING THE WRIT

I.

BACKGROUND AND PURPOSE OF SECTION 16(b)

In section 16(b), Congress enacted a bright-line prophylactic rule of strict liability. Such a rule was deemed necessary in order to curb speculative abuse of inside information and to maintain investor confidence in honest, competitive securities markets. As this Court has emphasized: " 'the *only* method Congress deemed effective to curb the evils of insider trading was a *flat rule* taking the profits out of a class of transactions in which the possibility of abuse was thought to be intolerably great.' " *Kern*, 411 U.S. at 592 (quoting *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972)) (emphasis added); see also *Gollust v. Mendell*, ___ U.S. ___, 111 S.Ct. 2173, 2178 (1991) (citing *Reliance*'s "flat rule" language).

Sweeping coverage, strict liability, ease of administration and reduction of difficulties in proof are essential to the achievement of congressional goals:

> In order to achieve its goals, Congress chose a relatively arbitrary rule capable of easy administration. The objective standard of section 16(b) imposes *strict liability* upon substantially all transactions occurring within the statutory time period, *regardless of the intent of the insider or the existence of actual speculation*. This approach maximized the ability of the rule to eradicate speculative abuses by *reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect.*

Reliance, 404 U.S. at 422 (quoting *Bershad v. McDonough*, 428 F.2d 693, 696 (7th Cir. 1970)) (emphasis added).

Accordingly, the statute presumes that insiders, including more-than 10% shareholders, have access to nonpublic information that will be used in trading in the company's stock.

See Foremost-McKesson, 423 U.S. at 243, 251; *Reliance*, 404 U.S. at 422. Liability arises "whether fair or unfair"[10] and regardless of the insider's "clean heart,"[11] honorable motive,[12] "good faith,"[13] or lack of scienter,[14] and even though the insider did not in fact engage in any actual speculative abuse whatsoever.[15]

Section 16(b) deliberately adopts an approach that is fundamentally different from that employed under section 10(b) and other areas of federal securities regulation. Market manipulation and actual abuse of inside information are not elements of a section 16(b) "violation." Case-by-case, transaction-by-transaction determinations were eschewed in favor of a flat rule that would (i) be easy to understand and apply, (ii) eliminate difficulties of proof, and (iii) maximize investor confidence. Although this approach might work hardships in

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[10] *E.g.*, *Blau v. Lamb*, 363 F.2d 507, 515 (2d Cir. 1966) (footnote omitted), *cert. denied*, 385 U.S. 1002 (1967); *Oliff v. Exchange Int'l Corp.*, 669 F.2d 1162, 1165-66 (7th Cir. 1980), *cert. denied sub nom. Sax v. Oliff*, 450 U.S. 915 (1981).

[11] *E.g.*, *Allis-Chalmers Mfg. Co. v. Gulf & W. Indus., Inc.*, 527 F.2d 335, 357 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 & 424 U.S. 928 (1976).

[12] *E.g.*, *Oliff v. Exchange Int'l Corp.*, 449 F.Supp. 1277, 1288 (N.D. Ill. 1978), *aff'd*, 669 F.2d 1162 (7th Cir. 1980), *cert. denied sub nom. Sax v. Oliff*, 450 U.S. 915 (1981); *Rothenberg v. United Brands Co.*, [1977-1978 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,045, at 91,690 n.1 (S.D.N.Y. May 11, 1977), *aff'd mem.*, 513 F.2d 1295 (2d Cir. 1977); *Schur v. Salzman*, 365 F.Supp. 725, 728 (S.D.N.Y. 1973).

[13] *E.g.*, *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 741 (8th Cir. 1965); *Lane Bryant, Inc. v. Hatleigh Corp.*, 517 F.Supp. 1196, 1198 (S.D.N.Y. 1981).

[14] *E.g.*, *Rothenberg*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. ¶ 96,045, at 91,690 n.1.

[15] *E.g.*, *Gund v. First Fla. Banks, Inc.*, 726 F.2d 682, 684-87 (11th Cir. 1984); *National Medical Enterprises, Inc. v. Small*, 680 F.2d 83, 84 (9th Cir. 1982); *Oliff*, 669 F.2d at 1165, 1167-68.

particular cases, Congress accepted this fact as a sacrifice necessary to having a general rule.[16]

For those who fail to observe the plain requirements of the statute, the remedy is relatively mild. There is no declaration of wrongdoing. The insider keeps its initial investment, surrendering only short-swing profits made within a six-month period. Moreover, section 16 grants the Securities and Exchange Commission broad power to ameliorate any unwarranted harshness by exempting transactions deemed to fall outside the purposes of the statute. See 15 U.S.C. § 78p(b).

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THIS CASE FALLS OUTSIDE THE EXCEPTION DEFINED IN *KERN COUNTY*

Mesa asserts that the "facts of this case are overwhelmingly, indeed strikingly, parallel to those of *Kern County*" (Pet. at 12), and that the Court of Appeals ignored and misapplied *Kern*. In truth, the Ninth Circuit faithfully followed standards enunciated by this Court in *Kern* and embraced in the section 16(b) cases ever since.

The Court of Appeals articulated its holding as follows: "We reverse because we have concluded that an exchange of *common stock* for a *negotiable debt security* pursuant to a *tender offer* is a 'sale' within section 16(b)." (Pet. at 7a; emphasis added.)[17] That ruling was dictated by a record that

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[16] In explaining the necessity of such a rule to Congress, Thomas Corcoran, one of the principal drafters of the 1934 Act, stated: "You have to have a general rule. In particular transactions it might work a hardship, but those transactions that are a hardship represent the sacrifice to the necessity of having a general rule." *Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency*, 73d Cong., 2d Sess. 6557-58 (1934).

[17] In the same vein, the Court of Appeals posed the question for decision in terms of Unocal's contention "that the 'unorthodox transaction defense' to an action brought pursuant to § 16(b) is not applicable to a self-tender offer in which a beneficial owner exchanges his common

(Continued on following page)

conclusively showed that (i) a calculated business decision was made by Mesa to cash out its equity investment by exchanging its stock for notes, (ii) this transaction was part of a tender offer offered to other Unocal shareholders, and (iii) Mesa actively negotiated the terms of the transaction. As the Court of Appeals observed, "[t]he Mesa Defendants had 'the choice of participating in the tender offer or holding onto their stock' " (Pet. at 24a), and "the nature of the Mesa Defendants' investment was changed" (Pet. at 34a) as a result of Mesa's decision to exchange stock for notes with fixed payments and interest rates.

In analyzing these core facts the Ninth Circuit applied long-settled standards derived from *Kern*,[18] from the history and purpose of section 16(b),[19] from the 16(b) cases dealing with changes in the form of a continuing equity investment,[20] and from 16(b) cases pertaining to tender offers, including sales by unsuccessful tender offerors.[21] Notwithstanding Mesa's claims to the contrary, the Court of Appeals manifestly did not hold that Mesa's sale must be subjected to the statute simply because it was not forced pursuant to a merger.

A. The Facts In This Case Are Decisively Different From Those In *Kern County*.

In *Kern*, Occidental's shares were forcibly converted into shares of a successor company in a defensive merger negotiated

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(Continued from previous page)

stock for negotiable debt securities issued as a result of a recapitalization of the issuer." (Pet. at 19a.)

[18] The Court of Appeals reviewed *Kern* in detail. (*Id.* at 22a-24a.) Among other things, the Ninth Circuit cited and relied upon *Kern*'s statement that traditional cash-for-stock transactions are clearly within the purview of § 16(b) (Pet. at 23a) and the fact that *Kern* characterized as "critical" the fact that Occidental's stock was involuntary in the sense that it was required pursuant to a merger. (*Id.* at 24a.)

[19] The Court of Appeals reviewed the history and purpose of § 16(b), particularly as described by this Court in *Kern* and *Reliance*. (*Id.* at 19a-21a.)

[20] *Id.* at 33a-34a.

[21] *Id.* at 30a-32a.

entirely by others. 411 U.S. at 585-87. Not only did Occidental have no control over the merger/forced conversion, it was *literally impossible* for Occidental to continue to hold its stock. The stock was automatically converted by the terms of a merger agreement to which Occidental was not a party, and in which Occidental had no voice. Occidental's only other choice was to sell on the open market in advance of the merger, which itself would have been a section 16(b) sale. Thus, in stark contrast to Mesa, which could have continued holding Unocal shares for more than six months, Occidental would be subject to section 16(b) liability through no volitional act of its own.[22]

The fact that the stock conversion was "required" in the absolute sense was "critical" to this Court's decision to exempt the transaction from the statute:

> The *critical fact* is that the exchange took place and *was required* pursuant to a merger between Old Kern and Tenneco. . . . Occidental obviously *did not participate in or control the negotiations or the agreement* between Old Kern and Tenneco. Once agreement between those two companies crystallized, *the course of subsequent events was out of Occidental's hands.*

Id. at 599 (emphasis added).

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[22] Mesa attempts to finesse this critical distinction by pointing out that the option Occidental obtained from Tenneco was a volitional act, but as this Court stated in *Kern*, "the mere execution of an option is not generally regarded as a 'sale' " for purposes of § 16(b), 411 U.S. at 601 (citations omitted), and the Occidental/Tenneco transaction did not present a cogent reason for altering that rule. *Id.* at 601-02. Furthermore, the date for the exercise of the option in *Kern* was set to occur more than six months from the granting of the option, a period (as noted by this Court in *Kern*) that is assumed to dissipate whatever trading advantage might be imputed to the insider. *Id.* at 603. In sharp contrast, all of the transactions at issue in this case – from the initial purchase by Mesa of Unocal stock to Mesa's exchange of that equity for senior notes, to Mesa's ultimate conversion of those notes to cash – occurred within the six months proscribed by the statute.

In summarizing its holding, *Kern* made clear that the decision was predicated on both the absence of potential for speculative abuse[23] *and* involuntariness:

> We do not suggest that an exchange of stock pursuant to a merger may never result in § 16(b) liability. But *the involuntary nature* of Occidental's exchange, *when coupled with absence of the possibility of speculative abuse* of inside information, convinces us that § 16(b) should not apply to transactions such as this one.

Id. at 600 (emphasis added).[24]

> In contrast, the Court of Appeals noted that, "[u]nlike the plight of the hapless beneficial owner in *Kern County*, the record conclusively shows that the Mesa Defendants voluntarily exchanged their common stock for negotiable debt securities. The exchange in the matter *sub judice* was not the

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[23] Although not necessary to this Court's decision on this petition, it should be mentioned that the seventy-third Congress, which passed the 1934 Act, would almost certainly have regarded Mesa's activities as a species of speculative abuse. Among other things, Mesa's activities included parking arrangements with convicted securities felons that were designed to make it appear that Mesa had successfully avoided § 16(b) (and that also resulted in the violation of other SEC regulations pertaining to net capital requirements). *See Reliance*, 404 U.S. at 428-29 nn. 2 & 3 (Douglas, J., dissenting) (reviewing the legislative history of § 16(b) and noting Congress' concerns with the "pooling" arrangements then prevalent that facilitated stock price manipulation).

[24] As the preeminent treatise on § 16(b) noted in summarizing the case law on this point:

> A few opinions refer only to access to inside information (or a potential for speculative abuse) as the appropriate touchstone, yet the vast majority of the cases correctly conclude that under *Kern County* both factors, involuntariness and no access to inside information, must exist before an unorthodox transaction can escape from being a statutory purchase or sale. This is consistent with – *no, mandated by – Kern* . . . .

Arnold S. Jacobs, *Section 16 of the Securities Exchange Act* § 3.04[5][a], at 3-107 to 3-108 (1989) (footnotes omitted and emphasis added) [hereinafter, "Jacobs"].

> inexorable consequence of corporate machinations that forced the stockholders to exchange their shares as the result of the dissolution of the corporation. Here, the beneficial owners controlled their own destiny and skillfully negotiated a result that Mr. Pickens characterized as a victory for his side."

(Pet. at 27a.) *Kern* also emphasized that Occidental's exchange of stock in "Old Kern" for stock in Tenneco was far removed from the "traditional cash-for-stock transactions" that were "clearly within the purview of § 16(b)." *Kern*, 411 U.S. at 593. Occidental did not exchange its stock for cash or notes, and the nature of its ongoing investment did not change. Stock in the predecessor company was converted into stock of a successor company, *i.e.*, from one form of equity to another form of equity. *Id.* at 586.

As the Court of Appeals noted, Mesa's situation bears no resemblance to the facts that were controlling in *Kern*. (Pet. at 24a-27a.) Among other things:

(1) Mesa's stock was not forcibly or automatically converted.[25]

(2) Far from having its long-term investment interrupted by unanticipated events beyond its control, Mesa specifically anticipated and planned for the prospect of selling stock within six months of the purchase.

(3) Mesa unquestionably could have held its shares,[26] and had complete control over whether and when its shares would be sold.[27]

(4) Mesa exchanged its stock for senior notes with fixed payments and interest rates[28] that were immediately converted to cash,[29] not for stock representing a different form of the same equity investment.[30]

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[25] Pet. at 24a-27a.

[26] *Id.* at 24a.

[27] *Id.* at 11a-12a, 24a-27a, 34a.

[28] *Id.* at 10a, 34a.

[29] *Id.* at 12a.

[30] *Id.* at 33a-34a.

(5) Mesa sold its stock pursuant to a settlement agreement between Mesa and Unocal;[31] the sale was not required by the terms of an agreement between third parties.

(6) The *only* agreement requiring the sale of Mesa's stock was actively and skillfully negotiated by Mesa.[32]

(7) Mesa wielded substantial bargaining power in the negotiations it initiated with Unocal,[33] and Mesa used its leverage to extract substantial concessions from Unocal.[34]

(8) After considering a variety of alternatives available to it,[35] Mesa made a shrewdly calculated business decision to exchange its stock for Unocal notes.[36]

B. Mesa Misstates The Court Of Appeals' Holding And Rationale.

Ignoring these fundamental distinctions from *Kern*, the petition asserts that the Ninth Circuit: "den[ied] the rationale of *Kern County*";[37] "circumscribed *Kern* as merely a 'fact-specific' case";[38] "dismissed a frequently cited statement in *Kern* because this Court 'did not cite any authority to support [it]' ";[39] "confin[ed] *Kern* to mergers";[40] and "conclud[ed] that 'involuntariness' (as narrowly defined by it) was necessary."[41] Thus, according to Mesa, the Ninth Circuit's decision "turns the clock back to pre-*Kern* days and adds substantial confusion to § 16(b) law." (Pet. at 27.)

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[31] *Id.* at 11a-12a.

[32] *Id.* at 11a-12a, 25a-27a, 34a.

[33] *Id.* at 25a-26a.

[34] *Id.* at 26a.

[35] *Id.* at 24a-27a, 34a.

[36] *Id.* at 34a.

[37] *Id.* at 7 n.10.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 26.

[41] *Id.*

None of these claims can be supported. The central premise of Mesa's argument – i.e., the repeated claim that the Court of Appeals held that the unorthodox transaction exception can only be applied when stock is involuntarily converted in a merger – is simply wrong.

Nowhere did the Ninth Circuit purport to limit or confine *Kern* to mergers. On the contrary, the opinion clearly acknowledges that *Kern* is *not* so limited. Among other things, the Court of Appeals expressly stated that "[t]he *majority* of the transactions which have been considered 'unorthodox' within the narrow exception announced in *Kern County* involve exchanges of stock pursuant to a merger." (Pet. at 29a; emphasis added.) Nor did the court hold that the unorthodox transaction exception could *only* be applied to involuntary transactions. What the Court of Appeals *did* state is that "[c]ourts following *Kern County* have recognized that involuntariness *is an important factor in determining*" whether a transaction can escape the provisions of section 16(b). (Pet. at 27a; emphasis added.) No one – not even Mesa – can quarrel with that proposition.

C. The Court of Appeals Did Not Ignore Footnote 24 From *Kern County*.

Mesa's contention that the Ninth Circuit dismissed as "irrelevant" the list of transactions set forth in *Kern*'s footnote 24 (Pet. at 7 n.10, 16) is also incorrect. The Court of Appeals carefully analyzed footnote 24 in response to Mesa's unfortunate mischaracterization of that passage. As the Ninth Circuit recognized, footnote 24 does not purport to specify transactions that are to be exempted from section 16(b) under the *Kern* analysis. It merely lists transactions that lower courts had previously *referred to* via the "term" "unorthodox" for purposes of "inclusion" and "exclusion."

In its entirety, the text to which *Kern*'s footnote 24 is appended reads as follows:

> Although traditional cash-for-stock transactions that result in a purchase and sale or a sale and purchase within the six-month, statutory period are clearly

> within the purview of § 16(b), the courts have wrestled with the question of *inclusion or exclusion* of certain "unorthodox" transactions.

411 U.S. at 593 (emphasis added). And footnote 24 itself merely states:

> The *term*, see 2 L. Loss, Securities Regulation 1069 (2d ed. 1961), *has been applied* to stock conversions, exchanges pursuant to mergers and other corporate reorganizations, stock reclassifications and dealings in options, rights, and warrants.

Id. at 593 n.24 (emphasis added).

The fact that *Kern* did not intend all transactions listed in footnote 24 to be exempted from the statute was further underscored by the statement that, under this Court's holding, even "exchanges pursuant to mergers" may fall outside the exception if they do not meet the articulated standards:

> We do not suggest that an exchange of stock pursuant to a merger may never result in § 16(b) liability. But the involuntary nature of Occidental's exchange, when coupled with the absence of the possibility of speculative abuse of inside information, convinces us that § 16(b) should not apply to transactions such as this one.

Id. at 600.

In response to Mesa's attempt to convert footnote 24 into a list of transactions that must be exempted from section 16(b) under *Kern*, the Court of Appeals noted that (i) footnote 24 was not part of *Kern*'s holding, (ii) footnote 24 merely enumerated, without expressing approval, the types of transactions that other courts had referred to as "unorthodox" and (iii) because no authority was cited it was unclear whether footnote 24 referred to decisions construing section 16(b). (Pet. at 32a-33a.) Thus, rather than "dismissing" footnote 24, the Ninth Circuit analyzed the passage and correctly concluded that Mesa's characterization of it was erroneous.

No court has ever held that *Kern* creates a section 16(b) exemption for all transactions referred to in that footnote. If the Court of Appeals had accepted Mesa's argument, the Ninth Circuit's opinion surely would have introduced confusion into section 16(b) jurisprudence.

III.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE ANALYTICAL APPROACH EMPLOYED BY THIS COURT OR THE SECOND CIRCUIT.

The petition argues that the decision of the Court of Appeals "contravenes the analytical approach" adopted by this Court in *Reves v. Ernst & Young*, 494 U.S. 56 (1990) and *Marine Bank v. Weaver*, 455 U.S. 551 (1982), and by the Second Circuit in *Blau v. Lamb*, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); *Mendell v. Gollust*, 909 F.2d 724 (2d Cir. 1990), *aff'd*, ___ U.S. ___, 111 S. Ct. 2173 (1991); *CRA Realty Corp. v. Crotty*, 878 F.2d 562 (2d Cir. 1989) and *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974). (Pet. at 11-12.)

The short answer to this argument is that *Kern* and its progeny establish the appropriate analytical approach with respect to the unorthodox transaction exception. *None* of the cases cited by Mesa involves the unorthodox transaction exception. None conflicts with the analytical approach adopted by the Court of Appeals.[42]

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[42] The petition's citation of snippets from concurring and dissenting opinions in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), is wholly unavailing. *Reves* held that demand notes should be *included* in (not excluded from) the "note" category of securities defined in § 3(a)(10) of the 1934 Act. Neither of the fragments abstracted from the concurring and/or dissenting opinions has any meaningful connection to this case.

Marine Bank v. Weaver, 455 U.S. 551 (1982), held that a certificate of deposit was not a security for purposes of § 10(b) of the 1934 Act – primarily because "the holders of bank certificates are abundantly protected under the federal banking laws." *Id.* at 559.

Mendell v. Gollust, 909 F.2d 724 (2d Cir. 1990), *aff'd*, 111 S.Ct. 2173 (1991), broadened the class of shareholders who have standing to sue under § 16(b). In adopting an expansive construction of the statute that was later affirmed by this Court, the Second Circuit pointedly observed that "[w]hen the statute permits interpretation the section traditionally has been read broadly in view of its remedial purposes." 909 F.2d at 728.

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While it is true that the context clause of the 1934 Act (§ 3(a)) qualifies the Act's statutory definitions with the phrase "unless the context otherwise requires," the context in which this case arises has been thoroughly examined in the decisions applying the unorthodox transaction exception. As is demonstrated herein, those decisions (including the decisions of this Court and the Second Circuit) fully support both the approach and the ruling of the Ninth Circuit here.

IV.

THERE IS NO CONFLICT AMONG THE CIRCUITS; MESA'S ARGUMENTS UNQUESTIONABLY WOULD HAVE MET THE SAME FATE HAD SUIT BEEN FILED ELSEWHERE

The petition cites two cases involving "recapitalizations," and five decisions purportedly pertaining to

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CRA Realty Corp. v. Crotty, 878 F.2d 562 (2d Cir. 1989), dealt with the thorny and esoteric question of who is a corporate officer. The court held that it is the duties of the employee, rather than the label affixed to his position, that determines whether he is an officer. Whether his duties afforded access to inside information was deemed a relevant factor in the "functional" analysis of corporate duties.

International Controls Corp. v. Vesco, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974), *expanded* the construction of "sale" for purposes of § 10(b). Although the court's construction was broader than an earlier interpretation of that term in the context of § 16(b), the reason for the minor disparity was the fact that, in contrast to § 16(b), § 10(b) protects the corporation's creditors. *Id.* at 1344-46, 1346 n.15. The decision was based on a peculiarity of § 10(b). It has nothing to do with the unorthodox transaction exception or the proper construction of § 16(b).

Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), was decided seven years before *Kern*. It provides no insight into the analytical approach that is appropriate in this case.

involuntariness, as being in conflict with the Ninth Circuit's decision not to exempt Mesa's sale from section 16(b). (Pet. at 18, 20-25.) On that basis, Mesa posits "sharp conflicts" between the Ninth Circuit and the Second, Fourth, Sixth and Eighth Circuits. An examination of the cases Mesa cites quickly demonstrates the absence of any such conflict.

A. Mesa's Reliance On The "Recapitalization" Cases Is Misplaced.

Although Mesa argues that its participation in Unocal's tender offer must be viewed as a "recapitalization," and that recapitalizations are "squarely within the listing enumerated in *Kern*'s footnote 24" (Pet. at 16), footnote 24 does not even list "recapitalizations" among the transactions that purportedly are to be exempted from section 16(b). Nevertheless, Mesa attempts to bootstrap the misconceived "footnote 24" argument it presented to the Court of Appeals into a conflict with the Second Circuit. There is no such conflict.

Mesa did not continue its equity investment. After making a "voluntary business decision" to negotiate an agreement with Unocal (Pet. at 10a), Mesa exchanged Unocal common stock for secured notes in a tender offer extended by Unocal. (Pet. at 10a.) Mesa changed the nature of its investment by liquidating common stock subject to the risks of the stock market in exchange for debt instruments with a significantly higher current value and fixed payments and interest rates. (Pet. at 33a-34a.) Mesa completed its cash-out by converting the notes it received in the tender offer to cash immediately upon receipt. (Pet. at 12a.)

Exchanges pursuant to tender offers – specifically including "self-tenders" by the issuer – are never exempted from section 16(b).[43] Despite Mesa's claim that the Ninth Circuit's

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[43] After surveying the § 16(b) cases, Jacobs' encyclopedic treatise on § 16(b) notes: "A tender offer is a purchase by the tender offeror and a sale by the tendering stockholder, *even if the tender offeror*

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decision conflicts with the law of the Second Circuit, the Second Circuit has made clear that this universal rule applies irrespective of whether the exchange can be characterized as a "recapitalization." *See, e.g., Blau v. Lehman*, 286 F.2d 786, 788-89, 792 (2d Cir. 1960), *aff'd*, 368 U.S. 403 (1962). Similarly, the post-*Kern* decisions of the district courts within the Second Circuit have refused to exempt tender offers from section 16(b). *See, e.g., T-Bar Inc. v. Chatterjee*, 693 F.Supp. 1 (S.D.N.Y. 1988) (self-tender); *Lane Bryant, Inc. v. Hatleigh Corp.*, 517 F.Supp. 1196 (S.D.N.Y. 1981); *Tyco Laboratories, Inc. v. Cutler-Hammer Inc.*, 490 F.Supp. 1 (S.D.N.Y. 1980).

In addition, no case has ever held that an exchange of equity securities for debt instruments[44] can be exempted from section 16(b), again, irrespective of whether such an exchange might be characterized as a "recapitalization." Moreover, since 1966, Securities and Exchange Commission Rule 16b-9, 17 C.F.R. § 240.16b-9 ("Exemption from section 16(b) of transactions involving the conversion of equity securities") has exempted certain transactions in which one *equity* security is exchanged for a substantially equivalent *equity* security. There is no exemption for the conversion of an equity security into a debt instrument.

The basic rationale for exempting certain exchanges of essentially equivalent equity securities was articulated by the Second Circuit in *Blau v. Lamb*: "in a conversion or reclassification . . . that which the insider surrenders and that which he receives are simply different forms of the same participation in his issuer." 363 F.2d at 523. Thus, even if Mesa's "exchange" had not occurred pursuant to a tender offer, it would fall well outside of the scope of both the

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is the issuer [i.e., Unocal]. The conclusion remains unchanged if the tendering shareholder [i.e., Mesa] is a defeated competing offeror tendering to the victorious tender offeror." Jacobs, § 3.04[3], at 3-94 (footnotes omitted and emphasis added).

[44] Convertible debt securities (not involved here) are considered equity securities for purposes of § 16(b), however.

Second Circuit's rationale for exempting certain equity conversions or reclassifications and the SEC's exemption of certain equity conversions in Rule 16b-9.

Curiously, the first recapitalization case cited by Mesa, *Rothenberg v. United Brands Co.*, [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,045 (S.D.N.Y. May 11, 1977), *aff'd mem.*, 573 F.2d 1295 (2d Cir. 1977), is, as the Court of Appeals correctly pointed out, directly contrary to Mesa's position.[45] *Rothenberg* stands for the well-settled proposition "that a recapitalization which results in a change in the nature of a beneficial owner's investment and market risk" is subject to section 16(b). (Pet. at 33a.)

Roberts v. Eaton, 212 F.2d 82 (2d Cir.), *cert. denied*, 348 U.S. 827 (1954), the other Second Circuit recapitalization case cited in the petition, involved a reclassification of common stock. Like *Rothenberg*, *Roberts* involved a stock reclassification that effected no change in the nature of the investment or the risk associated with it. In sharp contrast to Mesa's decision to exchange equity ownership for senior notes, the insider in *Roberts* merely received a different form of the same equity participation in the issuer. Thus, *Roberts* (which was decided before *Kern*) does not create any conflict regarding the proper application of *Kern* to this case.

B. Mesa's Reliance On The Involuntariness Cases Is Misplaced.

The ostensible conflict with the Second, Fourth, Sixth and Eighth Circuits regarding the necessity and meaning of involuntariness is also illusory. First and foremost, the Court of Appeals did not hold that involuntariness is a *necessary* element of the unorthodox transaction exception, or that the unorthodox transaction exception is limited to forced mergers. (See pp. 15-16, *supra*.) Confronted with a record that

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[45] Moreover, *Rothenberg* is not an opinion of the Second Circuit. It is an unpublished (except by CCH in the Federal Securities Law Reporter) district court decision that was affirmed without opinion.

conclusively demonstrates that Mesa changed the fundamental nature of its investment by virtue of its own calculated business decision to participate in Unocal's tender offer, the Court of Appeals concluded that the unorthodox transaction exception was inapplicable. The Ninth Circuit's decision literally cannot create any conflict regarding the necessity of involuntariness. Moreover, even if the Court of Appeals *had* limited the unorthodox transaction exception to involuntary conversions, there would still be no conflict.

The petition cites three appellate decisions in support of Mesa's claim that the circuits are in conflict over whether involuntariness is a necessary element under *Kern: Ferraiolo v. Newman*, 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959); *Petteys v. Butler*, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967); and *Gold v. Sloan*, 486 F.2d 340 (4th Cir. 1973), *cert. denied sub nom. Gold v. Scurlock*, 419 U.S. 873 (1974).

Ferraiolo and *Petteys* are pre-*Kern* cases dealing with the conversion of one equity security into another equity security at the apparent behest of the issuer to improve liquidity. In neither case did the fundamental nature of the holder's investment change. Neither case has any meaningful connection with the Court of Appeals' decision. Neither held that involuntariness is not a necessary element under *Kern*.

In addition to citing *Ferraiolo* and *Petteys* as holding that involuntariness is not a necessary element of the unorthodox transaction exception, Mesa cites those cases for the proposition that "economically coerced" transactions are involuntary. (Pet. at 24-25.) *Ferraiolo* and *Petteys* discuss economic coercion – not "involuntariness" under *Kern* – and they have been mooted by *Kern* and its progeny.[46] *Ferraiolo* and *Petteys*

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[46] Footnoting *Ferraiolo* and *Petteys*, the leading treatise on § 16(b) liability explains: "*Some old conversion cases* adopted a less stringent standard – the transaction was voluntary if the defendant could have avoided liability without serious economic detriment – *a standard which*

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are inapposite because they are stock conversion/reclassification cases in which the insider (i) continued to hold the same basic equity investment in the issuer, (ii) did not participate in a tender offer, and (iii) did not negotiate the deal pursuant to which its stock was exchanged.

No post-*Kern* decision has adopted any form of an "economic coercion test." Economic coercion arguments have been resoundingly rejected by the section 16(b) cases,[47] and,

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more recent decisions have rejected." Jacobs, § 3.04[5][a] at 3-111 (footnotes omitted and emphasis added).

In fact the Eighth Circuit, even before *Kern*, eschewed an opportunity to interpret *Petteys* as holding that "economic coercion" brings a transaction outside the strict liability of § 16(b). See *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736 (8th Cir. 1965). There the court held that a sale that was forced pursuant to a government antitrust decree was nevertheless a § 16(b) violation. While there is no case squarely on point in the Sixth Circuit, the little authority there is in no way suggests that that circuit would reach any contrary conclusion on the facts presented here. *See Champion Home Builders Co. v. Jeffress*, 490 F.2d 611, 619 (6th Cir.), ("The record does not show that Jeffress was forced to sell his Champion stock. To the contrary, the record indicates that Jeffress wanted to sell to realize cash . . . . "), *cert. denied sub nom. Jeffress v. Kramer*, 416 U.S. 986 (1974).

[47] *E.g., Heublein, Inc. v. General Cinema Corp.*, 722 F.2d 29, 31 (2d Cir. 1983), (involuntariness under § 16(b) requires complete inability to control terms, conditions and timing of transaction), *cert. denied*, 465 U.S. 1066 (1984); *American Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1054 (2d Cir. 1974) (involuntariness requires "utter inability . . . to control the course of events"), *cert. denied*, 421 U.S. 1000 (1975); *Oliff*, 669 F.2d at 1167-68 (sale to avoid 205% tax penalty not involuntary); *Western Auto Supply Co.*, 348 F.2d at 742, (sale pursuant to antitrust consent decree not involuntary); *Sprague Electric Co. v. Mostek Corp.*, 488 F.Supp. 842, 844-46 (N.D. Tex. 1980) (sale required by stockholders' agreement not involuntary); *Makofsky v. Ultra Dynamics Corp.*, 383 F.Supp. 631, 638-43 (S.D.N.Y. 1974) (sale to raise cash to avoid defaulting on contractual obligations not involuntary). *See generally* Jacobs,

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as the Court of Appeals noted, any such standard would run directly contrary to the policies underlying the statute. (Pet. at 28a-29a.)[48]

The only issue in *Gold*, the sole case cited as revealing a "conflict" with the Fourth Circuit, was whether an exchange of stock *pursuant to a merger* constituted a *purchase* for purposes of section 16(b):

> The only issue in the cases is whether the exchange by the defendants of their ARC stock for Susquehanna stock pursuant to the merger constituted a "purchase" within the terms of the Act as of the effective date of the merger so as to establish a starting date for measuring the six-month period between purchase and sale of stock by the several defendants.

486 F.2d at 342. Moreover, the Fourth Circuit did not mention, analyze or rule upon the issue of involuntariness.[49]

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§ 3.04[5][a], 3-111 ("An unorthodox transaction is involuntary as to an insider if he has an utter inability to control the terms, condition, or timing of the transaction.") (footnote omitted).

[48] The prospect of case-by-case determination of an infinite variety of unfortunate circumstances that "coerced" corporate insiders to sell their stock is exactly what § 16(b) was designed to avoid. Among other things, the statute expressly provides that profit is to be disgorged "irrespective of any intention on the part of" the insider. 15 U.S.C. § 78p(b).

[49] In *Bunker Ramo-Eltra Corp. v. Fairchild Industries*, 639 F.Supp. 409, 417 (D. Md. 1986), a district court in the Fourth Circuit underscored the invalidity of Mesa's citation of *Gold* as creating a conflict with the Court of Appeals' decision in this case:

> The Supreme Court found in *Kern County* that Occidental's involuntary exchange of stock pursuant to a merger was an unorthodox transaction. The court stated that once a sale and purchase of stock is determined to be an unorthodox transaction, then the question of whether there is actual insider information and resulting insider abuse should be considered.

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Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971), was the appellate decision affirmed in *Kern*. It does not (and could not) create any conflict regarding the proper application of *Kern*, because it does not interpret or apply this Court's decision. In any event, *Abrams* clearly was based on the fact that Occidental "did not arrange" the transaction and was "forced" to participate in it. *Id.* at 162.

Like *Abrams*, *American Standard, Inc. v. Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975), involved an automatic, nonvolitional sale required by the terms of a merger negotiated by others. *Id.* at 1054-56. The court expressly relied on the "nonvolitional" character of the exchange (*id.* at 1056) and on what the opinion described as *Kern*'s emphasis on "the utter inability of the unsuccessful party to control the course of events." *Id.* at 1054.

Unlike the defendants in *American Standard* and *Abrams* (i.e., *Kern*), Mesa was not faced with a merger or other form of forced conversion. Unlike the defendants in *American Standard* and *Abrams*, Mesa actively negotiated the settlement agreement pursuant to which its Unocal stock was sold and had the option of not selling at all. (Pet. at 24a-27a.)

Mesa had a *variety* of alternatives short of fighting to the end. Mesa could have simply held its stock without making a further tender offer.[50] Mesa also could have negotiated a sale (whether to Unocal or otherwise) that would become effective after expiration of the six-month period prescribed by section

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Defendants' reliance upon *Gold v. Sloan*, 486 F.2d 340 (4th Cir. 1973), *cert. denied*, 419 U.S. 873, 95 S.Ct. 134, 42 L.Ed.2d 112 (1974), to show that the transaction in this case was an unorthodox transaction is misplaced since in *Gold*, there was an exchange of stock pursuant to a merger not a cash transaction as in this case.

[50] If Mesa had held its stock for the "investment purpose" stated in its initial Schedule 13D filed with the SEC, it could have reaped a profit of approximately $532,000,000 through December 1989.

16(b). Moreover, Mesa's alternative of continuing the take-over effort was far from abstract. Drexel Burnham Lambert (Mesa's investment banker) had already raised $3 billion for this purpose. (Pet. at 25a.) Faced with this array of options, Mesa chose to cash out of the investment at an $83,000,000 after-tax profit. (Pet. at 26a-27a.)

C. Mesa's Claim That The Result In This Case Would Have Been Different In The Second Circuit Is Without Merit.

This case plainly would not have been decided differently had it been filed within the Second Circuit. As demonstrated above, *Abrams*, *American Standard*, *Roberts* and *Rothenberg* not only provide no support for Mesa's contrary claim, their reasoning refutes Mesa's argument. Moreover, other decisions of the Second Circuit demonstrate that this case would have been decided no differently had the action been filed in that jurisdiction. In *Perine v. William Norton & Co.*, 509 F.2d 114 (2d Cir. 1974) (decided before this Court's decision in *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232 (1976)), for example, an underwriter which, pursuant to a firm-commitment underwriting became a more-than 10% shareholder of the issuer, and which then sold those shares pursuant to the underwriting, argued that liability under section 16(b) should not apply because it had no access to inside information. The Second Circuit made short work of this contention:

> Without the possibility of its having had prior access to inside information, [appellant] argues, the distribution did not present the potential for abuse that is inherent in short-term transactions by insiders. *See Kern County Land Co. v. Occidental Petroleum Corp.*, *supra*, 411 U.S. at 594-595.
>
> Were it not for the plain language of § 16(b) and the established policy in favor of mechanical application of that language, *see Reliance Electric Co. v. Emerson Electric Co.*, *supra*, [appellant's] argument might be persuasive. But § 16(b) provides in sweeping and unequivocal terms that "*any* profit

> realized by [such beneficial owner] from *any* purchase and sale . . . of *any* equity security of such issuer . . . within *any* period of less than six months . . . shall . . . be recoverable by the issuer, irrespective of *any* intention on the part of such beneficial owner . . . in entering into such transaction . . . (emphasis supplied).

Perine, 509 F.2d at 117-18 (emphasis in original).[51]

In applying *Kern* and the unorthodox transaction exception, the Second Circuit requires involuntariness in the absolute sense that was decisive in *Kern* – not merely facts indicating that the insider had no access to inside information:

> We believe that Judge Conner's decision below accurately states and applies the law of both the Supreme Court case, *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 93 S.Ct. 1736, 36 L.Ed.2d 503 (1973), and this circuit's decision in *American Standard, Inc. v. Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000, 95 S.Ct. 2397, 44 L.Ed.2d 667 (1975), and we find his well reasoned opinion persuasive. . . . We read Judge Conner's opinion to mean that in the *class* of cases of which the present case is representative, *where* (1) an atmosphere of suspicion, if not hostility, characterizes relations between the two corporations, (2) *the exchange of shares is "involuntary" in that it is effectuated pursuant to a*

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[51] The court also emphasized *Reliance* and *Kern*'s repeated references to the prophylactic presumptions that Congress mandated and that have been featured in § 16(b) jurisprudence:

> Making administration of the statutory scheme simple, Congress adopted a prophylactic measure which permits recovery by the corporation of the profits from a class of insider transactions in which "the possibility of abuse was believed [by Congress] to be intolerably great", *i.e.*, purchases and sales by an insider within six months, *Reliance Electric Co., supra*, 404 U.S. at 422, "without proof of actual abuse of insider information, and without proof of intent to profit on the basis of such information", *Kern*, 411 U.S. at 595."

Perine, 509 F.2d at 117.

> *merger* over which the investing corporation exercised no control or influence, *and* (3) there is no likelihood of access to material inside information, § 16(b), the "paradigmatic strict liability statute," is inappropriate and will not apply.

Heublein, Inc. v. General Cinema Corp., 722 F.2d 29, 31 (2d Cir. 1983) (first emphasis in the original), *cert. denied*, 465 U.S. 1006 (1984).

Three district court cases decided within the Second Circuit have rejected Mesa's argument that *Kern* exempts transactions in which an unsuccessful tender offeror sells its stock within six months of a purchase while contending that it had no access to inside information. *T-Bar Inc. v. Chatterjee*, 693 F.Supp. 1 (S.D.N.Y. 1988); *Lane Bryant, Inc. v. Hatleigh Corp.*, 517 F.Supp. 1196 (S.D.N.Y. 1981); *Tyco Laboratories, Inc. v. Cutler-Hammer, Inc.*, 490 F.Supp. 1 (S.D.N.Y. 1980). Each of these cases was decided on the basis of *Kern* and the law of the Second Circuit. Each was cited and relied upon in the decision of the Court of Appeals. (Pet. at 30a-31a.)

V.

THERE IS NO REASON TO CREATE ANY SPECIAL SECTION 16(b) EXEMPTION FOR DEFEATED TENDER OFFERORS AND "GREENMAILERS."

The courts applying *Kern* have repeatedly and uniformly rejected the "defeated tender offeror" argument advanced by Mesa. As Jacobs notes: "Because a contest for control was *Kern County*'s factual origin, defeated contestants who sold otherwise than through such a merger have attempted to argue that *Kern County* also governs their sale, and therefore their sale is unorthodox. *These arguments have proved unavailing.*" Jacobs, § 3.04[5][d], at 3-145 (emphasis added). In addition to the decisions within the Second Circuit, the other circuit courts confronted with claims of unorthodoxy in the defeated tender offeror situation (based in substantial part upon assertions of hostility and consequent lack of access to inside information) have all concluded that the *Kern* exception did not apply. *See, e.g., Super Stores Inc. v. Reiner*, 737 F.2d 962

(11th Cir. 1984); *Texas Int'l Airlines v. National Airlines, Inc.*, 714 F.2d 533 (5th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

Since 1934, the SEC has had express authority to create exceptions to the statute's literal terms *if* in the opinion of the Commission the class of transactions is "not comprehended within the purpose of" section 16(b). 15 U.S.C. § 78p(b). Not surprisingly, neither the Commission nor Congress has sought to disturb the courts' consistent application of section 16(b) to volitional sales by unsuccessful tender offerors.

After a statute has been construed "by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by Congress itself." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part). The interpretation of a statute by the agency charged with administering it is entitled to considerable deference. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Such deference extends to an agency's decision not to act, *Heckler v. Chaney*, 470 U.S. 821, 834 (1985), and is especially appropriate when Congress has declined to alter an administrative construction. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969).

Entirely apart from questions of judicial deference and upsetting settled expectations, there is no principled reason why a hostile tender offeror should be exempted from the statute. This is particularly true when all others, many of whom are in an equally plausible position to argue economic coercion and lack of access to inside information, are subject to this bright-line, prophylactic rule of strict liability.

Section 16(b) was directed at (among other things) short-swing profits made by those who "manipulate the market price of their corporation's shares by causing the corporation to inaugurate and follow financial policies calculated to produce sudden fluctuations in that price." *Arrow Distribution Corp. v. Baumgartner*, 783 F.2d 1274, 1277-78 (5th Cir. 1986); *accord Blau v. Lamb*, 363 F.2d 507, 514-15 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). The greenmail

profits garnered via this sort of market manipulation by hostile tender offerors should not be removed from the sweeping coverage mandated by Congress.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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